UNITED STATES DISTRICT COURT

DISTRICT OF MAINE

PAUL W. MOUNTS	)	
	)	
Movant	)	
	)	
v.	)	Civil No. 04-173-P-C
	)	Criminal No. 99-79-P-C
UNITED STATES OF AMERICA,	)	
	)	
Respondent	)	

RECOMMENDED DECISION ON 28 U.S.C. § 2255 MOTION

Paul Mounts is serving a 240-month federal sentence after pleading guilty to a single count indictment alleging that he conspired to distribute and possess with intent to distribute cocaine and cocaine base. The United States has filed a motion to dismiss (Docket No. 3) arguing first and foremost that the motion is barred by the 28 U.S.C. § 2255 ¶ 6 statute of limitation and that Mounts has not demonstrated any legitimate reason for excusing his untimeliness. For the reasons below, I recommend that the Court **GRANT** the United States' motion and dismiss the 28 U.S.C. § 2255 motion as time-barred.

Discussion

This court's judgment in Mounts's case was entered on December 28, 2000. On February 21, 2001, Mounts filed a notice of appeal which was deemed timely filed by this court.[1] In an opinion dated January 7, 2003, the First Circuit Court of Appeals

[1] Mounts had filed a 28 U.S.C. § 2255 motion the day after his conviction which he withdrew on January 21, 2001.

affirmed Mounts's conviction and sentence. The mandate issued on February 3, 2003, and was received by this court on February 27, 2003.

Mounts's form 28 U.S.C. § 2255 motion is dated May 2, 2004; however, it was not received by this court until August 4, 2004. In dating and signing the motion Mounts offers an unusual elaboration: "I swear under penalty of perjury that I gave this 2255 petition to the prison officials on May-2, 2004 for mailing to the court 28 U.S.C. 1746." Mount indicates in the body of this motion that the date of "the result" from the First Circuit on his direct appeal was February 3, 2003.

I am in agreement with the United States that -- even giving Mounts the benefit of my rather serious doubts concerning when he gave this § 2255 motion to prison officials and also assuming that the prison mailbox rule would apply in this situation where there was an over three-month stretch before the clerk's office received the motion -- Mounts's motion is untimely. Mounts did not seek certiorari review from the United States Supreme Court. The United States Supreme Court unequivocally concluded, in Clay v. United States, "that, for federal criminal defendants who do not file a petition for certiorari with this Court on direct review, § 2255's one-year limitation period starts to run when the time for seeking such review expires." 537 U.S. 522, 527-32 (2003). Clay stated that the time in which a petitioner has for seeking certiorari expires ninety days after entry of the Court of Appeals' judgment and the Court cited its own Rule 13(1). Id. at 525. That rule states:

> Unless otherwise provided by law, a petition for a writ of certiorari to review a judgment in any case, civil or criminal, entered by a state court of last resort or a United States court of appeals (including the United States Court of Appeals for the Armed Forces) is timely when it is filed with the Clerk of this Court within 90 days after entry of the judgment.

Sup. Ct. R. 13(1). The First Circuit's docket indicates: "1/7/03 JUDGMENT entered."

Counting from January 7, 2003, twenty-four days ran in January 2003; twenty-eight days ran in February 2003[2]; and thirty-one days ran in March 2003. This left seven of the ninety days and, accordingly, Mounts's ninety-day period for seeking Supreme Court certiorari review expired on April 7, 2003. April 7, 2004, was the anniversary date of when Mounts's § 2255 ¶ 6 year began to run and this is the date by which he had to file his § 2255 motion. See Rogers v. United States, 180 F.3d 349, 355 (1st Cir. 1999); see also Lattimore v. Dubois, 311 F.3d 46, 54 (1st Cir. 2002).[3]

The second of Mounts's two § 2255 grounds seems to be an effort to obtain § 2255 review in the event that the Court concludes, as I have, that Mounts's motion is facially untimely under 2255 ¶ 6(1). This ground does not identify a constitutional infirmity with his underlying sentence or conviction but alleges that prison officials have confiscated all of Mounts's legal papers and this interfered with his ability to file an Anders brief in his direct appeal (or his opposition to appointed counsel's Anders brief on

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[2] The United States jumps from calculations based on the 2003 calendar year for January to calculations based on the 2004 calendar year for February, a leap-year year, and, so, the United States arrives at April 6, 2004, as being Mounts's § 2255 ¶ 6(1) deadline.

[3] If you counted from the February 3, 2003, date that the mandate entered then Mounts's § 2255 would have begun to run on May 4, 2003, and by signing his petition May, 2, 2004, Mounts would have established a case for a timely motion. He would still, it must be said, have a huge hurdle in proving his entitlement to a three-month application of the prisoner mailbox rule. In announcing its conclusion that the prisoner mailbox rule applied to the filing of 28 U.S.C. § 2255 motions and § 2254 petitioner, the First Circuit's Morales-Rivera v. United States decision (addressing a time-lapse of similar proportions) vacated the judgment of the district court and remanded "for a determination of whether the appellant deposited his petition in the prison's internal mail system by the deadline using, if available, the prison's legal-mail system." 184 F.3d 109, 111 (1st Cir. 1999). The Court then dropped the following footnote:

> Nothing in this opinion is designed to prevent the government from contending, if this is its position, that the appellant did not utilize the prison mail system at all or, if available, did not use the prison's system for recording legal mail. Similarly, it is free to argue, if this is its position, that the original filing was not properly addressed due to the appellant's negligence, that no properly addressed filing was deposited in the prison mail system prior to the deadline, and that the appellant should be debarred under these circumstances from obtaining the benefit of the mailbox rule. As these issues have not been fully developed, we express no opinion whatever about their proper resolution.

Id. n.4. In a footnote in its motion to dismiss, the United States bemoans the fact that the envelope containing Mounts's motion was discarded by the court's clerk's office (an action taken pursuant to safety protocols).

appeal, ? See Docket Summary, United States Court of Appeals) and forestalled his efforts to seek certiorari review by the United States Supreme Court.

In his reply to the motion to dismiss Mounts, in a conclusory fashion, states vis-à-vis the statute of limitation argument made by the United States that the one-year period can be tolled in the instant case. (Resp. Mot. Dismiss at 7.) Mounts also "maintains that the Bureau of Prisons, through its various levels of wardens, associate wardens, captains, secret undisclosed SIS officers, staff officers and guards have effectively impeded his access to the courts as indicated by Petitioner's institutional record." (Id. at 9.) Mounts bases this argument on what is now codified as 28 U.S.C. § 2254 ¶ 6(2) which would, if applied, mean that his one-year did not commence to run until "the date on which the impediment to making a motion created by governmental action in violation of the Constitution or laws of the United States is removed, if the movant was prevented from making a motion by such governmental action." Mounts represents that his record is marred by a series of institutional indiscretions for minor offenses, landing him in the Special Housing Unit, where he has been without access to legal books, typewriters, copy machines, or an inmate's law clerk. (Resp. Mot. Dismiss at 9.) He also claims that he has experienced retaliation in reaction to his minor infractions, and states that he was transferred to an auxiliary facility during the United States' filing apropos this current § 2255 proceeding. (Id.) Mounts argues that this demonstrates that the § 2254 ¶6(2) impediment still exists and that his motion should not be deemed untimely given that these circumstance were beyond his control. (Id. at 10.)

I do not believe that these representations about his traverse in and out of segregation, unsubstantiated by any details in an affidavit or prison records, demonstrate

grounds for invoking subsection (2) of § 2255 ¶ 6 or equitable tolling, see Neverson v. Farquharson, 366 F.3d 32 (1st Cir. 2004). Mounts had a full year to prepare what is in essence a single issue habeas challenge.[4] By his own representations, Mounts has been the perpetrator "of institutional indiscretions for minor offenses," and, counter to his characterization, any resulting segregation was not entirely a creature of circumstance beyond his personal control. Mounts had a chance to respond to the United States' motion to dismiss with concrete information about his argument for tolling or vis-à-vis government impediment and he has not adequately done so even though he was given an extension of time and was able to compose a fifteen page memorandum. See United States v. McGill, 11 F.3d 223, 225 (1st Cir.1993) ("When a petition is brought under section 2255, the petitioner bears the burden of establishing the need for an evidentiary hearing. In determining whether the petitioner has carried the devoir of persuasion in this respect, the court must take many of petitioner's factual averments as true, but the court need not give weight to conclusory allegations, self-interested characterizations, discredited inventions, or opprobrious epithets.")(citations omitted). I certainly have no reason to believe on the record before me that Mounts's first year in federal custody has been so different from that of other § 2255 movants that it brings this § 2255 ¶ 6(1) inquiry out of the realm of mine-run and into the murkier terrain of equitable tolling or a subsection (2) government impediment.[5]

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[4] The allegations in the second ground do not attack the validity of Mounts's conviction or sentence but, at most, pertain to the validity of the outcome on direct appeal vis-à-vis the Anders brief and the validity of the resolution of this motion vis-à-vis the ability to respond to the United States' showing. Those sorts of claims do not attack the validity of the underlying criminal conviction or sentence and are not proper fodder for a § 2255 motion. If Mounts has credible demonstrable evidence of prison officials interfering with his right of access to the courts, there are other legal mechanisms he might choose to pursue.

[5] Furthermore, the ground Mounts seeks to raise now is that his attorney delivered ineffective assistance of counsel by not defending Mounts adequately vis-à-vis the attribution of drug quantities to

CONCLUSION

For the reasons stated above, I RECOMMEND that the court **GRANT** the United States' Motion to Dismiss (Docket No. 3) and dismiss the 28 U.S.C. § 2255 motion as time-barred.

NOTICE

A party may file objections to those specified portions of a magistrate judge's report or proposed findings or recommended decisions entered pursuant to 28 U.S.C. § 636(b)(1)(B) for which *de novo* review by the district court is sought, together with a supporting memorandum, within ten (10) days of being served with a copy thereof. A responsive memorandum shall be filed within ten (10) days after the filing of the objection.

Failure to file a timely objection shall constitute a waiver of the right to *de novo* review by the district court and to appeal the district court's order.

Dated: November 24, 2004.

/s/ Margaret J. Kravchuk
U.S. Magistrate Judge

Mounts which resulted in a sentence that ran afoul of Apprendi v. New Jersey, 530 U.S. 466 (2000). This is a simple ground to present, as the Apprendi issue was an issue recognized by this court at sentencing and by the First Circuit on direct appeal. See United States v. Mounts, No. 01-1389, 2003 WL 42268, *1 (1st Cir. Jan. 7, 2003) (observing that this court concluded that because a drug quantity had not been charged in the indictment or proven to the jury beyond a reasonable doubt, under Apprendi v. New Jersey, 530 U.S. 466 (2000), the maximum sentence Mounts could receive was 20 years"). The First Circuit also alerted Mounts to his ability to present ineffective assistance claims in a § 2255 motion. Id. ("To the extent that Mounts is claiming ineffective assistance of counsel, the factual record concerning Mounts' allegations that his attorney misled him about the consequences of pleading guilty or his right to proceed to trial is not sufficiently developed to permit reliable review on direct appeal. Our rejection of Mounts' ineffective assistance claim is without prejudice to his presenting that claim on collateral review under 28 U.S.C. § 2255.") (internal citation omitted).

Mounts's chance of succeeding on the merits of such a claim, to which Mounts adds Blakely v. Washington, __ U.S. __, 124 S. Ct. 2531 (June 24, 2004), are dim, see Thomas v. United States, Civ. No. 04-243-P-H, 2004 U.S. Dist. LEXIS 23575, 4-6 (D. Me. Nov. 19. 2004), especially in view of the fact that Mounts's attorney actually successfully advocated for Mounts apropos what was then the understanding of the reach of Apprendi.

MOUNTS v. USA
Assigned to: JUDGE GENE CARTER
Referred to: MAG. JUDGE MARGARET J. KRAVCHUK
Cause: 28:2255 Motion to Vacate / Correct Illegal Sentenc

Date Filed: 08/04/2004
Jury Demand: None
Nature of Suit: 510 Prisoner: Vacate Sentence
Jurisdiction: U.S. Government Defendant

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